

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Chattanooga Bakery, Inc.
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Serial No. 90287400
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Robert O. Fox of Luedeka Neely Group, PC,
for Chattanooga Bakery, Inc.

Andrea Koyner Nadelman, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

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Before Bergsman, Goodman and Coggins,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Chattanooga Bakery, Inc. (“Applicant”) seeks registration on the Principal



Register of the mark

(“marshmallow” and “pie” disclaimed) for

“bakery goods, namely, marshmallow sandwiches” in International Class 30.¹

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¹ Application Serial No. 90287400 was filed on October 29, 2020, based upon Applicant’s assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant provided the following description of the

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on likelihood of confusion with the registered mark MELLOW PIE (in standard characters, "pie" disclaimed) for "chocolates and chocolate based ready to eat candies and marshmallow snacks excluding brownies" in International Class 30.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). We

mark: "The mark consists of a stylized presentation of Mello in a circle, with Marshmallow Party Pie in a rectangle with curved ends located below Mello."

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system. Applicant's brief is at 6 TTABVUE and its reply brief is at 9 TTABVUE. The Examining Attorney's brief is at 8 TTABVUE.

² Registration No. 5083187 issued on the Principal Register on November 15, 2016.

consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors and others are discussed below.

A. Similarity or Dissimilarity and Nature of the Goods

We first consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. *See also Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). Thus, we base our evaluation on the goods as they are identified in the application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citations omitted).

Applicant’s goods are “bakery goods, namely, marshmallow sandwiches” and Registrant’s goods are “chocolates and chocolate based ready to eat candies and marshmallow snacks excluding brownies.”

Applicant argues the goods are not identical and that the Examining Attorney attempts to expand Applicant’s goods beyond what they are. 6 TTABVUE 6; 9 TTABVUE 2.

In her brief, the Examining Attorney references extrinsic evidence of Applicant's and Registrant's goods that was submitted by the Examining Attorney in an office action. 8 TTABVUE 8. However, it is well established that it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of either Applicant's or Registrant's goods. *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008).

The Examining Attorney, without any evidence, also argues that the goods are presumed to be identical because "marshmallow snacks" is broadly defined to include "marshmallow sandwiches." 8 TTABVUE 8-9. However, because there is no evidence of record defining either "marshmallow snacks" or "marshmallow sandwiches, we take judicial notice of "marshmallow," "snack," and "sandwich" as follows: "marshmallow" is "a sweetened paste or ... similar confection, usually soft and spongy, made from gum arabic or gelatin, sugar, corn syrup, and flavoring;" "snack" is "a small portion of food or drink or a light meal, especially one eaten between regular meals;" and "sandwich" is "two or more slices of bread with a layer of meat, fish, cheese, etc., between them:" ... [or] "a partially slit bread roll, pita, etc., with a filling" ... [or] something suggesting or resembling a sandwich as something in horizontal layers."³ From the ordinary meanings of these words, we find that a

³ RANDOM HOUSE UNABRIDGED DICTIONARY, [dictionary.com/browse/marshmallow](https://www.randomhouse.com/dictionary/browse/marshmallow), [dictionary.com/browse/snack](https://www.randomhouse.com/dictionary/browse/snack) and [dictionary.com/browse/sandwich](https://www.randomhouse.com/dictionary/browse/sandwich) (accessed June 15, 2022). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). We also take judicial notice of the pronunciation of "marshmallow" as [mahrsh-mel-oh, -mal-oh].

“marshmallow snack” is broad enough to encompass a “marshmallow sandwich.” Therefore, the goods are in part legally identical. *See e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

The second *Dupont* factor weighs in favor of a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Trade Channels

The third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. Our analysis under this factor is based on the identifications of goods in the application and the cited registration. *In re Detroit Athletic Co.*, 128 USPQ2d at 1052. There are no restrictions of trade channels in the application or the cited registration.

Because the goods are in part legally identical, we presume that the channels of trade and classes of purchasers for Applicant’s and Registrant’s legally identical goods overlap. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health*

Research Inst., 101 USPQ2d 1022, 1028 (TTAB 2011) (same). This *DuPont* factor weighs in favor of finding a likelihood of confusion.

C. Strength of the Mark

We address Applicant's argument that the term MELLOW in the cited mark is weak and, therefore, accorded a limited scope of protection or exclusivity of use. 6 TTABVUE 5-6. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016) (We may consider whether an inherently distinctive mark is "weak as a source indicator" in the course of a *DuPont* analysis.).

In determining the strength of the cited mark, we consider inherent strength, based on the nature of the mark itself.⁴ *New Era Cap. Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011). Word marks registered without a claim of acquired distinctiveness that are arbitrary, fanciful or suggestive are "held to be inherently distinctive." *See generally, Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). However, there is no inherent or acquired distinctiveness in a disclaimed term in a registered mark. *See Sock It To Me*,

⁴ The commercial strength based on the marketplace recognition of the mark also is a consideration. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)").

However, "[i]n an ex parte analysis of the *du Pont* factors for determining likelihood of confusion ..., the '[commercial strength] of the mark' ... is normally treated as neutral when no evidence as to [marketplace recognition] ... has been provided." TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (Jun. 2021). Because there is no evidence of record regarding the commercial strength of the cited mark, this consideration is neutral.

Inc. v. Aiping Fan, 2020 USPQ2d 10611, at *9 (TTAB 2020) (the registration’s disclaimer of SOCK tacitly admits that the word is not inherently distinctive, but the mark, SOCK IT TO ME taken as a whole, is inherently distinctive, although its strength is somewhat limited by its first word, SOCK, which is generic for socks); *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1275 (TTAB 2016) (no inherent distinctiveness or acquired distinctiveness to a disclaimed term in a registered mark).

During prosecution, Applicant submitted twelve TSDR printouts of third-party MELLOW and MELLO composite registrations to support its argument that the cited mark is weak. May 31, 2021 Response to Office Action at TSDR 8-28. Applicant also provided a copy of the request for reconsideration in the registration file for the cited registration that contained a list of MELLO and MELLOW composite registrations with the registration numbers and identified goods.⁵ May 31, 2021 Response to Office Action at TSDR at 6-7 Exhibit A. Applicant incorporated this list in its response to an office action and in its brief. 6 TTABVUE 5; May 31, 2021 Response to Office Action at TSDR 4. Therefore, we consider this list of third-party registrations to be additional third-party registration evidence submitted during prosecution in support of Applicant’s argument that “mellow” is a weak term.

⁵ One of the third-party registrations on this list is for the term MELLOs alone. It is unclear whether Registrant’s request for reconsideration was accompanied by TSDR printouts as Applicant has not submitted any exhibits that accompanied the request. We note that a list of registrations is insufficient to make them of record; copies of the registrations themselves are required for that purpose. *In re Hub Duofold, Inc.*, 184 USPQ 638, 640 TTAB 1974). This exhibit also does not include the submission coversheet generated from an electronic filing with the Office which would be helpful to associate the filing with Registrant’s application file since the reconsideration request itself lacks any markings associating it with Registrant’s application.

In the June 21, 2021 Office Action at TSDR 1, the Examining Attorney addressed the third-party registration evidence and did not advise Applicant that the listing of registrations incorporated into its response (or as shown in the attached exhibit to the response) does not make the registrations of record. Therefore, the Examining Attorney waived the objection as to the list of third-party registrations submitted by Applicant, and we consider the list for whatever probative value it may have. *In re Dist. of Columbia*, 101 USPQ2d 1588, 1592 n.5 (TTAB 2012).

As to the value of this evidence, third-party registration evidence bears on conceptual weakness. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-695 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”)). There is no third-party use evidence in the record which would be reflective of commercial or marketplace weakness. *Tao Licensing*, 125 USPQ2d at 1057. We note that Exhibit A (the reconsideration request submitted in the file of the cited registration) submitted with Applicant’s May 31, 2021 Response to Office Action also contains a reference to the online American Heritage Dictionary definition for “mellow” as “soft, sweet, juicy and full flavored...”; “suggesting softness or sweetness...”; “flavorful and mild or smooth...”; “soft and pleasant.” Although no copy of the dictionary definition accompanied this exhibit, we take judicial notice of that dictionary definition.

Following are the third-party registrations from the submitted list that do not overlap with the TSDR third-party registration copies submitted by Applicant in its response to office action:

Reg. no. 3924666 MELLOS for candy coated popcorn

Reg. No. 4785818 THE MELLO MANGO for frozen yogurt

Reg. No. 4243427 HELLO! MELLOW for marshmallow; marshmallow squares

Reg. No. 3033059 MELLOW MONK for tea

Reg. No. 3479735 MELLO-CUP for coffee

Reg. No. 3814344 YELLOW MELLOW for cookies

Reg. No. 3110354 RICEMELLOW for confections

Reg. No. 4731624 MELLOWTERRANEAN for pizza

Reg. No. 2476162 MELLOWOUT for tea

Reg. No. 0691354 MELLOW-RICH for chocolate flavored syrup.

Below is the chart provided in Applicant's May 31, 2021 Response to Office Action at TSDR 4 reflecting the TSDR printouts of third-party MELLO/MELLOW formative registrations provided by Applicant in its response to office action.⁶

⁶ The same chart was incorporated into the brief but portions are illegible.

Mark	Reg. No.	Goods (CI 30)
FUNKY MELLO	6168857	Marshmallows, marshmallow fluffs, and rice crisp-based treats
	6055761	Chocolate-based products; candy
MELLOW MONKEY	5784116	Chocolate; bakery desserts
	5667043	Candy
	5128803	Chocolate, chocolate bars
MELLOWMARSH	5262377	Candy bars
	4199088	Confectionary, namely, marshmallows covered with chocolate
MELLOW FLUFFS	3278725	Candy
MELLOWCREME	3180059	Candy not for the institutional or foodservice trade channel
MEL-O-CREAM	2766943	Bakery goods
GUMMY MELLO	1847430	bi-textured artificially fruit flavored and marshmallow flavored candy
MELLOCREAM	1589175	Chocolate fudge sold in institutional and foodservice trade channels

Although some of the goods identified in the third-party registrations (TSDR printouts and the list) are not as similar to Registrant’s goods, seventeen do show conceptual weakness for the term MELLOW in connection with food items such as candy, chocolate, bakery items, and marshmallow treats. This is consistent with the dictionary definition that the word “mellow” can mean sweetness which would be suggestive of candy, chocolate, bakery items and marshmallow treats. We find MELLOW is suggestive of the sweetness of Registrant’s marshmallow goods.

As to the weakness of MELLOW PIE as a whole, the Examining Attorney has pointed out that none of the third-party registrations consist of the terms MELLOW and PIE together. In addition, most of the marks listed by Applicant or provided as TSDR printouts have other matter besides MELLOW or MELLO to distinguish them from each other and from the cited mark.⁷

Only Applicant's and Registrant's marks include both MELLO/MELLOW and PIE. Thus, these third-party registrations do not establish conceptual weakness of MELLOW PIE as a whole such that the term as a whole is entitled to a narrower scope of protection. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259-60 (Fed. Cir. 2010) (Applicant's submission of a group of registrations that have the letters "ML" as part of a longer letter string (i.e., MLUXE, M'LIS, JML and AMLAVI) not persuasive; "The indiscriminate citation of third-party registrations without regard to the similarity of the marks involved is not indicative that the letters ML have a suggestive or descriptive connotation."); *In re Merck & Co., Inc.* 189 USPQ 355, 356 (TTAB 1975) (third-party registrations showing frequent adoption of the letter "M" as a portion of composite mark do not establish that registrant's mark M-VAC as a whole is weak and entitled to limited protection).

Applicant references "admissions" made by the Registrant during prosecution of the application underlying the cited registration. 6 TTABVUE 4; *see also* 9 TTABVUE 2-3. In Registrant's request for reconsideration, (provided as an exhibit by Applicant to its response to office action), Registrant stated that the term MELLOW was weak

⁷ We note three "mello cream" or phonetically equivalent marks co-exist.

because it and phonetically identical words had been adopted and registered by numerous third parties and that consumers will not be confused as a result of the common occurrence of that term. *See* May 31, 2021 Response at TSDR 6-7.

However “[s]uch statements [by Registrant] cannot be viewed as binding judicial admissions, since a decision maker may not consider a party’s opinion relating to the ultimate legal conclusion of likelihood of confusion (particularly in another case) as a binding admission of a fact” and such prior statements are not binding judicial admissions on the decision maker. *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013) (citing *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978) (“[T]hat a party earlier indicated a contrary opinion respecting the conclusion in a similar proceeding involving similar marks and goods is a fact, and that fact may be received in evidence as merely illuminative of shade and tone in the total picture confronting the decision maker.”)) Thus, Registrant’s prior position is not a binding judicial admission, but may be considered as illuminative of shade and tone in the total picture.

Because Registrant’s mark MELLOW PIE has some suggestive significance, we find that its conceptual strength is somewhat reduced, but as noted above, none of the third-party registered marks are as close to Registrant’s mark as Applicant’s mark.

D. Similarity or Dissimilarity of the Marks

We next turn to the first *DuPont* factor, which requires us to determine the similarity or dissimilarity of the marks when viewed in their entirety in terms of

appearance, sound, connotation and overall commercial impression. *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff’d*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the goods at issue are snack foods, the average purchaser is an ordinary consumer.

“[S]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)). Because the involved goods are in part legally identical, “the degree of similarity between the marks necessary to support a determination that confusion is likely declines.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citing *Bridgestone Ams.*

Tire Operations, LLC v. Fed. Corp., 673 F.3d. 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012)).

Applicant argues that its mark differs in sight, sound and meaning from Registrant's mark, particularly because its mark contains distinctive design features, additional wording, and two distinctive alliterative "mello marshmallow" and "party pie" components. 6 TTABVUE 4, 9 TTABVUE 2. Applicant submits that these additional elements distinguish Applicant's mark from Registrant's mark and create a different commercial impression. 6 TTABVUE 4, 9 TTABVUE 2.

Applicant also points to the information it provided on reconsideration as to the meaning of the term "mello," showing that the term is not in the dictionary, "is not a word in the U.S. language," and does not have a specific meaning, while the term MELLOW in Registrant's mark is a known word with a specific meaning. 6 TTABVUE 7; 9 TTABVUE 3. Applicant argues that there is no evidence in the record that supports the Examining Attorney's arguments that MELLO and MELLOW have the same meaning, and the Examining Attorney ignores the evidence that Applicant provided showing MELLO has no meaning. 9 TTABVUE 3. Applicant also points to the Examining Attorney's withdrawal during prosecution of a second cited registration for the mark MELLO as "disingenuous" with the maintenance of the refusal to register as to the cited MELLOW PIE mark.⁸ 6 TTABVUE 3.

⁸ Applicant argues that it is disingenuous that the Examining Attorney withdraw the citation to the mark MELLO but maintained the refusal as to MELLOW PIE. 6 TTABVUE 3. In response, the Examining Attorney explains that she withdrew the citation to MELLO because the term was more in the nature of a surname than an adjective and the goods were different. 8 TTABVUE 11.

The Examining Attorney, on the other hand, argues that the dominant portions of Applicant's and Registrant's marks, MELLO/MELLOW, are phonetic equivalents, highly similar, and MELLO/MELLOW in each mark is the term most likely to be remembered by consumers. 8 TTABVUE 6. The Examining Attorney submits that both marks as a whole convey the commercial impression of either a "mellow pie" or "marshmallow pie." 8 TTABVUE 9.



Applicant's mark is  ("marshmallow" and "pie" disclaimed) and Registrant's mark is MELLOW PIE ("pie" disclaimed). Registrant's mark is in standard characters and is not limited to any particular font, size, style, or color and could appear in the same font and stylization as the literal portion of Applicant's mark. Trademark Rule 2.52(a); 37 CFR § 2.52(a).

While Applicant's and Registrant's marks must be considered in their entirety, including any disclaimed or otherwise descriptive matter, or designs, it is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight in the analysis. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751-52 (Fed. Cir. 1985). Disclaimed matter is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

Similarly, where a mark is comprised of both words and a design, the words are normally accorded greater weight, because consumers are likely to remember and use the word(s) to request the goods or services. *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services”); *see also, In re Viterra*, 101 USPQ2d at 1911 (“[T]he verbal portion of a word and design mark likely will be the dominant portion.”).

In Applicant’s mark, the literal portion is more dominant than the design elements. The simple circle in Applicant’s mark operates more as a background carrier for the term MELLO, as does the oblong shape that carries the wording MARSHMALLOW PARTY PIE. Of the literal MELLO MARSHMALLOW PARTY PIE portion in Applicant’s mark, MELLO is the dominant feature; it is more prominent and in substantially larger letters than the other wording MARSHMALLOW PARTY PIE, for which “marshmallow” and “pie” have been disclaimed as descriptive of the goods.

As to Registrant’s mark, MELLOW PIE, the dominant portion is MELLOW as the word “pie” is disclaimed as descriptive of Registrant’s goods. The term MELLO in Applicant’s mark and MELLOW in Registrant’s mark are the first terms in each mark and therefore more likely to be remembered by consumers in calling for the goods. *See Palm Bay Imps.*, 73 USPQ2d at 1692.

MELLO in Applicant's mark and MELLOW in Registrant's mark are similar in appearance, differing by the addition of the letter "w" in Registrant's mark. MELLO in Applicant's mark may be perceived as a slight misspelling or phonetic equivalent of "mellow." See *In re Mayer-Beaton Corp.*, 223 USPQ 1347, 1348 (TTAB 1984) (BIKINEEZ is the phonetic equivalent of bikinis). See also *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938) (NU-ENAMEL; NU found equivalent of "new"); *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'"); *In re Organik Tech. Inc.*, 41 USPQ2d 1690, 1694 (TTAB 1997) ("ORGANIK, which is the phonetic equivalent of the term 'organic,' is deceptive").

As to similarity in sound, there is no one correct pronunciation of a term in a mark that is not an actual word, and MELLO could be pronounced in a variety of ways, (e.g., either with a long ē or short ě). But to the extent that MELLO is pronounced with a short ě and long ō, it could be pronounced the same as "mellow."⁹ Therefore, we find that MELLO and MELLOW could be pronounced similarly.

Furthermore, to the extent that MELLO is considered a misspelling and phonetic equivalent of "mellow," these terms convey similar or identical meanings of "sweetness" and perhaps even a shortened reference to "marshmallow,"¹⁰ and also convey similar commercial impressions. See e.g., *In re Cynosure, Inc.*, 90 USPQ2d

⁹ We take judicial notice that "mellow" is pronounced as (mĕlō). American Heritage Dictionary, <https://ahdictionary.com/word/search.html?q=mellow> (accessed June 15, 2022).

¹⁰ See n.3, "marshmallow" may be pronounced as "marshmellow."

1644, 1646 (TTAB 2009) (“CYNERGY and SYNERGIE are highly similar, if not identical, phonetic equivalents”; “[b]oth marks connote “synergy” which dominates the commercial impression of both marks).

When we consider the marks in their entirety, MELLO MARSHMALLOW PARTY PIE and design and MELLOW PIE, we acknowledge that there are differences in sound and appearance given the additional words in each mark and the additional design features in Applicant’s mark. However, we find that the additional terms “marshmallow party” that precede the term “pie” in Applicant’s mark still provide a similar connotation, merely providing further descriptors as to the term “pie,” resulting in a similar connotation and overall commercial impression of MELLO/MELLOW PIE. As to Applicant’s argument that MELLO MARSHMALLOW and PARTY PIE are alliterative phrases within its mark that distinguish its mark and the cited mark, we do not find that the use of two separate alliterative phrases in Applicant’s mark is sufficient to distinguish Applicant’s and Registrant’s marks. Nor are these alliterations sufficient to overcome the overall commercial impression of “mellow/mello pie” when considering the marks in their entirety.

Therefore, we find the marks are similar. This *DuPont* factor weighs in favor of finding a likelihood of confusion.

II. Conclusion

We find Applicant’s mark and Registrant’s mark are similar, the goods legally identical in part, and the trade channels overlap. Therefore, notwithstanding that

the registered mark has suggestive significance and its conceptual strength is somewhat reduced, confusion is likely.



Decision: The Section 2(d) refusal to register Applicant's mark is affirmed.